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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B231189
(Super. Ct. No. PA063025-02)
(Los Angeles County)

David Hernandez appeals a judgment following conviction of first degree murder, with findings that a principal personally used a firearm causing death, and the crime was committed to benefit a criminal street gang. (Pen. Code, §§ 187, subd. (a), 189, former 12022.53, subd. (e), 186.22, subd. (b).)¹ We affirm.

FACTS AND PROCEDURAL HISTORY

In the early morning of September 27, 2008, Northridge resident Joseph Litalien was awakened by sounds of gunshots. He looked into his backyard with a flashlight but did not notice anything amiss. A high wall separated his property from Louise Avenue and he was unable to see the street on the other side of the wall.

At 1:20 a.m. that same morning, a passing motorist saw the body of Roel Mejia lying on the parkway grass between Litalien's residence and Louise Avenue. After observing that Mejia was not moving, the motorist summoned police assistance.

¹ All further statutory references are to the Penal Code unless stated otherwise.

A medical examiner performed an autopsy on Mejia's body and determined that he died from six gunshot wounds, including five wounds to the head. The gunshots were fired from a distance of eight inches or less.

Defendant Hernandez was a member of the "Brown Pride Surrenos" criminal street gang and his moniker was "Demon." He held a position of leadership within a subset of the gang and was known to be a "shot-caller," the "main man" who had "the word." Other members of the gang included Harley Maganda, Ruben Hernandez (Ruben), victim Mejia, and Daniel Flores.

Marissa Rauda was Hernandez's erstwhile girlfriend and was with Hernandez, Mejia, Ruben, and Flores the evening of Mejia's murder. Although she did not witness the killing, she testified regarding events that occurred before and after Mejia's death. The prosecutor provided Rauda with immunity from prosecution in exchange for her testimony.

In November 2007, Rauda and Hernandez lived together. Police officers visited their apartment and arrested Hernandez for illegal possession of a firearm. Hernandez informed Rauda that he believed that Mejia had "snitch[ed]" on him. Hernandez repeated the accusation the following year.

On September 16, 2008, Los Angeles Police Officer Robert Ferrer stopped a vehicle driven by Hernandez for a seat belt violation. Despite a police order that he remain in the vehicle, Hernandez ran from the vehicle into the residential neighborhood. Ferrer then questioned the passengers in Hernandez's vehicle, including Mejia, regarding the driver's identity. Ferrer learned that Hernandez was the driver and that he ran because he was carrying a firearm. Rumors later circulated among the gang members that Mejia was "a snitch."

In the early evening of September 26, 2008, Rauda drove Hernandez to a middle school in North Hills where they met Mejia, Flores, Ruben, Maganda, and others for a "post-up" (gathering). Mejia was "buzzed" (intoxicated) when he arrived. The group socialized, consumed beer for several hours, and then decided to attend a "flyer" party, "a party that anyone can go to [and] pay to get in."

At the flyer party, members of another criminal street gang were present. Partygoers consumed beer and inhaled nitrous oxide from balloons. Hernandez and Mejia each consumed three or four beers, and Mejia inhaled nitrous oxide. Mejia was "drunk, acting a fool, bumping into people," and dancing with men and women. Hernandez and Ruben advised Mejia to "check himself, like stop acting up," and warned that he "was going to get regulated." After Hernandez and Ruben took Mejia aside, he settled down but continued to dance by himself. Hernandez and Ruben became serious and quiet.

Ruben and Maganda then left the party together. Hernandez informed Rauda that they left "to . . . get a gun" to "take care" of Mejia. Rauda believed that they intended to kill Mejia. She stated to Hernandez that she did not "want anything to do with it." Hernandez responded that it was "too late," and that she "already kn[ew] too much." Hernandez had the keys to Rauda's automobile and she accompanied him because she feared him.

Hernandez drove to a residential street in Northridge and later to Dearborn Park for a "switch-up" (exchange of vehicles). After depositing Rauda and passenger S. on the curb near the park, Hernandez drove away with passengers Ruben and Mejia. Hernandez directed Flores and Maganda to drive Ruben's automobile to a nearby fast food restaurant and meet him there later.

In approximately 20 minutes, Hernandez and Ruben returned and picked up Rauda and S. As they drove to the fast food restaurant to meet Flores and Maganda, Hernandez laughed and stated that Ruben "emptied the whole clip on [Mejia] and left him with no face." Hernandez explained that Mejia left the car and fell in the parkway grass where he was shot.

Within several days of the killing, police officers arrested Hernandez and interviewed Rauda. After her police interview, Rauda met with Maganda, Flores, and Ruben to "get our stories together." The group agreed that Rauda and Maganda would inform police that they had no information concerning the killing. Rauda then cleaned her automobile and discarded floor mats containing red stains. Rauda's mother retrieved

the floor mats from the trashcan, however, and provided them to the police. Later laboratory testing of the floor mats did not reveal the presence of blood, but the police criminalist testified that the test results may have been influenced by cleaning agents Rauda used.

At trial, Rauda and Maganda admitted that they have criminal records. During several police interviews, Rauda gave many inconsistent versions of the events immediately before and after Mejia's death. In one version, she stated that she was present during the shooting. She later explained that she fabricated that version in order to persuade police to allow her to return home. Maganda testified that he also lied to police officers during his initial interview.

Expert Witness Gang Evidence

Los Angeles Police Officer James Leone testified as an expert witness regarding the Brown Pride Surrenos criminal street gang. Leone stated that gang members "regulat[e]" fellow gang members who are either "snitches" or perceived as weak by reprimanding, assaulting, or killing them. Leone opined that Hernandez was a member of the Brown Pride Surrenos gang based upon his tattoos, his admission to Leone, and photographs of him displaying gang hand signs. Leone also testified that Hernandez held a leadership position within the gang. Leone opined that killing a fellow gang member who was perceived as a "snitch" benefitted the gang by creating an atmosphere of fear and intimidation.

Conviction and Sentencing

The jury convicted Hernandez of first degree murder and found that a principal personally used a firearm during commission of the crime causing the victim's death, and the crime was committed to benefit a criminal street gang. (§§ 187, subd. (a), 189, former 12022.53, subd. (e), 186.22, subd. (b).) Pursuant to the prosecutor's motion, the trial court dismissed allegations that Hernandez served two prior prison terms. (§§ 667.5, subd. (b), 1385.) The court sentenced Hernandez to 25 years to life for the murder plus 25 years to life consecutive for the firearm enhancement, for a total term of 50 years to life. The court imposed a \$5,000 restitution fine, a \$5,000 parole revocation

restitution fine (stayed), a \$40 court security fee, and a \$30 criminal conviction fee, ordered restitution, and awarded Hernandez 875 days of presentence custody credit. (§§ 1202.4, subd. (a), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Hernandez appeals and contends that: 1) insufficient evidence supports the judgment; 2) the trial court erred by not declaring a mistrial, sua sponte; 3) the trial court abused its discretion by refusing to admit evidence of a photograph of Maganda posing with two firearms; 4) the trial court abused its discretion by denying his motion for a new trial asserting grounds of insufficient evidence; 5) the trial court abused its discretion by admitting evidence that he had served time in jail, been convicted of a firearms offense, and was the leader of a criminal street gang; and 6) he received ineffective assistance of counsel.

DISCUSSION

I.

Hernandez argues that insufficient evidence supports the judgment because Rauda and Maganda are not credible witnesses, having provided many inconsistent versions of the events occurring that evening.

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) Our review is the same in a prosecution resting primarily upon circumstantial evidence. (*People v. Watkins* (2012) 55 Cal.4th 999, 1020.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, overruled on other grounds by *People v. Rundle* (2008) 43 Cal.4th 76, 151.) We must accept logical inferences that the jury might have drawn from the evidence although we would have concluded otherwise. (*Streeter*, at p. 241.)

Sufficient evidence supports the judgment. Although Rauda and Maganda gave inconsistent statements to police officers, they explained they did so to protect

Hernandez and themselves. It is the jury's province to determine their credibility and weigh the explanations given for their inconsistent statements. Rauda and Maganda testified at trial consistent with their final statements to police officers and they corroborated each other's testimony. Moreover, their testimony was further corroborated by Litalien's testimony and the physical evidence as to when, where, and how the murder was committed, i.e., Mejia was shot five times in the face at approximately 1:00 a.m. as he lay on the parkway close to Dearborn Park. The testimony of Rauda and Maganda is reasonable, credible, and of solid value sufficient to allow a reasonable trier of fact to find Hernandez guilty beyond a reasonable doubt. (*People v. Streeter, supra*, 54 Cal.4th 205, 241 [standard of review].)

II.

Hernandez asserts that the trial court erred by not declaring a mistrial sua sponte when Rauda volunteered that police officers intended to test her with a polygraph exam ("They were going to give me a lie detector test"). He claims the error was exacerbated by his attorney's follow-up questions regarding the exam.

The trial court should grant a mistrial if prejudice that is incurable by admonition or instruction arises. (*People v. Dement* (2011) 53 Cal.4th 1, 39.) The court is vested with "considerable discretion" in determining a mistrial motion because whether a particular incident is incurably prejudicial is "a speculative matter." (*Id.* at pp. 39-40.) A witness's volunteered statement may provide the basis for a finding of incurable prejudice. (*Id.* at p. 40.)

The trial court did not abuse its discretion by not granting a mistrial sua sponte because evidence of Rauda's polygraph examination was not incurably prejudicial. Rauda's volunteered statement was brief and the court admonished the jury that it should not speculate regarding the results of any polygraph examination because the results are inadmissible at trial. We presume that jurors understand and follow the court's instructions. (*People v. Myles* (2012) 53 Cal.4th 1181, 1212; *People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

Moreover, Hernandez's cross-examination of Rauda as well as the interviewing police officer established that Rauda lied during the polygraph examination. Indeed, Rauda admitted giving a third, false version of the events occurring that evening during the polygraph examination. Under the circumstances, evidence of the examination was beneficial to Hernandez's defense because it suggested Rauda was not a credible witness.

III.

Hernandez argues that the trial court abused its discretion by refusing to admit evidence of a 2007 photograph of Maganda posing with two firearms. He asserts that the court's evidentiary ruling impaired his federal and state constitutional rights to present a defense.

Prior to Maganda's testimony, Hernandez informed the trial court that he would offer into evidence a 2007 photograph of Maganda "proud[ly]" holding two firearms as evidence of Maganda's "true nature." The prosecutor objected on grounds of Evidence Code section 352. The court later ruled that the photograph's prejudicial effect outweighed its probative value. The court noted that Maganda testified that he had a prior felony conviction for possession of a firearm, and stated that Hernandez could question Maganda if he owned a firearm at the time of the 2008 killing.

Evidence Code section 352 requires the trial court to weigh the probative value of evidence against the dangers of prejudice, confusion, and undue consumption of time. (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1154.) The court may exclude the evidence if these dangers substantially outweigh the evidence's probative value. (*Ibid.*) We review the court's ruling for an abuse of discretion. (*People v. Homick* (2012) 55 Cal.4th 816, 865.)

The trial court did not abuse its discretion because the 2007 photograph had little relevance to whether Maganda possessed a firearm in 2008 similar to the one used to kill Mejia. Evidence of the photograph was also cumulative because Maganda already testified that he had a 2007 conviction for illegal firearm possession and that he was a member of Brown Pride Surrenos.

Application of well-established evidentiary rules permitting the trial court to exclude evidence if its probative value is outweighed by certain other factors, such as unfair prejudice, confusion of the issues, or potential to mislead the jury, does not infringe upon a defendant's right to present a defense. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1259.) For example, third-party culpability evidence may be excluded where it does not sufficiently connect the other person to the crime, or where the evidence is speculative or remote. (*Ibid.*) Here exclusion of this single photograph did not impair Hernandez's right to present a defense because he otherwise presented evidence regarding Maganda's prior firearm possession. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999; *People v. Page* (1991) 2 Cal.App.4th 161, 185 [trial court's ruling was not a "blanket exclusion" that stripped defendant of his defense].)

IV.

Hernandez contends that the trial court erred by denying his motion for a new trial based upon the sufficiency of the evidence.

In denying the motion, the trial judge stated: "I heard the evidence, observed the demeanor of the witnesses, and having considered all the evidence in this case and the arguments of counsel and applying the appropriate standard . . . the motion is denied."

In deciding a new trial motion, the trial court weighs the evidence independently. (*People v. Fuiava* (2012) 53 Cal.4th 622, 729.) The court should not disregard the verdict but instead consider the proper weight to be accorded to the evidence and then decide whether sufficient credible evidence exists to support the verdict. (*Id.* at pp. 729-730.) The court has broad discretion in determining a new trial motion and its ruling will be upheld unless "a manifest and unmistakable" abuse of discretion appears. (*Id.* at p. 730.)

Here the trial court performed its duty to weigh the evidence independently pursuant to well-settled law governing new trial motions. As discussed in *I., ante*, sufficient evidence supports the judgment. The testimony of Rauda and Maganda is reasonable, solid, and credible, and is corroborated by other evidence. The court did not

abuse its discretion by denying the new trial motion. (*People v. Wharton* (1991) 53 Cal.3d 522, 565 [mistrial motion properly denied because admonition and witness's later testimony under cross-examination dispelled prejudice].)

V.

Hernandez asserts that the trial court abused its discretion by allowing evidence that he had a prior criminal conviction for possession of a firearm, served jail time for that offense, was a leader of a Brown Pride Surrenos clique, and was arrested quickly for Mejia's murder. Hernandez does not specify the precise evidence that he argues should have been excluded, nor does he establish that he objected to the evidence in the trial court. (Evid. Code, § 353, subd. (a).) Evidence Code section 353, subdivision (a) requires that the defendant specifically object to evidence to permit the prosecutor and trial court to determine its admissibility. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435.) Hernandez has thus forfeited this argument on appeal.

Forfeiture aside, the trial court did not abuse its discretion by permitting Rauda to testify that Hernandez believed that he was arrested and punished because Mejia "snitched" that he illegally possessed a weapon. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [standard of review].) Moreover, the court instructed with a limiting instruction that Hernandez's prior arrest, confinement, and parole status related only to his motive in killing Mejia. We presume that jurors understand and follow the court's instructions. (*People v. Myles, supra*, 53 Cal.4th 1181, 1212.)

Likewise, the trial court did not err by permitting evidence of Hernandez's leadership role in the clique. The evidence was relevant to establish Hernandez's motive and intent in murdering Mejia and to prove the criminal street gang allegation. Evidence of Hernandez's early arrest was also admissible to establish why Rauda, Maganda, and Ruben did not include him in their meetings to "get [their] stories together." Moreover, Hernandez was not the only party arrested; evidence established that Ruben and Maganda were also arrested, albeit later.

VI.

Hernandez contends that he received ineffective assistance of counsel because his attorney failed to: request accomplice instructions regarding witnesses Rauda and Maganda, object to the polygraph examination evidence, and present third party culpability evidence regarding gang member Flores.

It is settled that a defendant is entitled to the effective assistance of counsel by the state and federal Constitutions. (*People v. Vines* (2011) 51 Cal.4th 830, 875.) A defendant bears the burden of establishing the inadequacy of trial counsel. (*Ibid.*) To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms. (*Ibid.*) Second, he must also show prejudice flowing from counsel's performance or lack thereof, i.e., a reasonable probability that, but for the errors, the result of the proceeding would have been different. (*Id.* at pp. 875-876.) A defendant's burden is difficult to carry on direct appeal. (*Id.* at p. 876.)

Accomplice Instructions

An accomplice is "someone subject to prosecution for the charged crimes by reason of aiding and abetting or being a member of a conspiracy to commit the charged crimes." (*People v. Houston* (2012) 54 Cal.4th 1186, 1224.) An accomplice must have guilty knowledge and intent with regard to the commission of the crime. (*Ibid.*) Mere knowledge of a defendant's criminal intent, presence at the scene, or failure to prevent a crime is alone insufficient to establish guilt as an aider and abettor. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.)

Here counsel was not ineffective because the accomplice instructions were not warranted. There is no evidence that Rauda or Maganda had the requisite intent to commit the murder of Mejia or to aid and abet his murder. Neither was present at the murder scene and Rauda testified that she did not "want anything to do with it." The failure of either witness to prevent the crime is not alone sufficient to establish guilt as an aider and abettor. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.)

Polygraph Examination
Third Party Culpability Evidence

Counsel was not deficient for failing to object to the polygraph examination because the evidence benefitted Hernandez by establishing that Rauda lied during the polygraph examination and that even the police did not find her credible. This was a reasonable tactical decision by counsel within the range of reasonable professional assistance. (*People v. Vines, supra*, 51 Cal.4th 830, 876.)

The third party culpability evidence concerned a recorded conversation Flores had with his cellmate. In part, Flores stated that "we took care of" a fellow gang member who snitched and that he almost "caught a homicide case." In a discussion with the prosecutor and the trial court regarding the admissibility of this evidence, Hernandez acknowledged that the statement was "a double-edged sword." Counsel's decision not to introduce Flores's statements into evidence is also a reasonable tactical decision to which we defer. (*People v. Vines, supra*, 51 Cal.4th 830, 876.)

Hernandez relies upon *Madrigal v. Yates* (C.D. Cal. 2009) 662 F.Supp.2d 1162, 1176-1180, a prosecution of two criminal street gang members for attempted murder. There Madrigal's attorney failed to listen to or offer into evidence a recorded conversation between Madrigal's codefendant and the codefendant's girlfriend stating that the codefendant rebuffed Madrigal's inquiries regarding the identity of the shooter: "[The codefendant] was angry with [Madrigal] for making these inquiries and informed [Madrigal] that it was none of his business who committed the shooting. Further, [the codefendant] repeatedly told his girlfriend that [Madrigal] did not know who actually committed the . . . shooting." (*Id.* at p. 1178.) The court found that the defense attorney's failure to listen to the tapes and introduce them into evidence deprived Madrigal of critical evidence and his best defense. (*Id.* at p. 1179.)

Here Hernandez's attorney listened to and considered offering into evidence the recorded conversation between Flores and his cellmate, but decided that Flores's statements were "a double-edged sword," i.e., "we took care of" a fellow gang member who snitched. It is a reasonable inference from Flores's statement Hernandez, a "shot-

caller" and "main man" of the Brown Pride Surrenos, was involved in the shooting of Mejia for snitching. Flores's statements are not "highly exculpatory" statements that "necessarily exonerate" Hernandez. (*Madrigal v. Yates, supra*, 662 F.Supp.2d 1162, 1178.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Burt Pines, Judge
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